

# THE STATE OF NEW HAMPSHIRE

## SUPREME COURT

**In Case No. 2004-0611, State of New Hampshire v. Michael J. DeMeritt, the court on November 30, 2005, issued the following order:**

The defendant, Michael J. DeMeritt, appeals his convictions for first-degree assault and felon in possession. See RSA 631:1, I(b) (1996); see also RSA 159:3 (2002). He argues that the evidence was insufficient to convict him of these charges. We affirm.

We first consider the State's contention that the defendant failed to preserve any argument that the evidence in support of the first-degree assault charge was insufficient. We conclude that the defendant preserved this issue for our review.

"The general rule in this jurisdiction is that a contemporaneous and specific objection is required to preserve an issue for appellate review." State v. McMin, 141 N.H. 636, 642 (1997) (quotation omitted). "This rule, which is based on common sense and judicial economy, recognizes that trial forums should have an opportunity to rule on issues and to correct errors before they are presented to the appellate court." Id. (quotations and citation omitted).

The record demonstrates that, as argued by the parties, the defendant's challenges to the sufficiency of the evidence on the felon in possession charge and the first-degree assault charge were linked. As the prosecutor stated:

I think there is enough evidence for a trier of fact to make – to come to a conclusion that the charge of first-degree assault alleges that this individual assaulted [the victim] with this handgun. If there is sufficient evidence to go to the trier of fact on that issue, there certainly is with respect to the charge of being a felon in possession.

The record further shows that the trial court, in ruling upon the defendant's argument that the evidence was insufficient to support the felon in possession charge, considered whether the evidence was also insufficient to support the first-degree assault charge. As the trial court stated:

There is some evidence whereby this jury could reasonably find, first of all, that [the defendant] was the one in the trailer; Number 2, that

he was the one that inflicted the injuries on the victim; Number 3, that these injuries were inflicted by the weapon – by a firearm; and Number 4, that the firearm was a firearm in or about the area in which the defendant was taken into custody. So considering those facts, taken in the light most favorable to the State, I’m going to find – deny the motion.

Thus, although the defendant’s motion to dismiss originally targeted only the felon in possession charge, the record shows that the trial court had an opportunity to consider whether the evidence was sufficient on the first-degree assault charge. Under these circumstances, we determine that the defendant’s argument that the evidence was insufficient to convict him of first-degree assault was preserved for appellate review. Because we conclude that the defendant preserved this argument for our review, we need not address the parties’ arguments regarding the “plain error” rule.

To prevail on his challenge to the sufficiency of the evidence, the defendant must prove that no rational trier of fact, viewing all of the evidence and all reasonable inferences from it in the light most favorable to the State, could have found guilt beyond a reasonable doubt. State v. Evans, 150 N.H. 416, 424 (2003). When the evidence is solely circumstantial, it must exclude all rational conclusions except guilt. Id. Under this standard, however, we still consider the evidence in the light most favorable to the State and examine each evidentiary item in context, not in isolation. Id.

We first consider whether the evidence was sufficient to convict the defendant of the first-degree assault charge. To convict the defendant of first-degree assault, the State had to prove that he knowingly caused bodily injury to the victim with a deadly weapon. See RSA 631:1, I(b). Viewing the evidence in the light most favorable to the State, we conclude that it was sufficient to convict the defendant of first-degree assault.

The victim testified that the person who attacked him had short hair and a scruffy beard. His neighbor testified that the person he apprehended, who the neighbor identified as the defendant, had a scruffy beard. Another neighbor testified that the person apprehended had a short crew cut.

The evidence also included testimony that, when he was arrested, the defendant was barefoot. Two shoes were recovered at the crime scene. One shoe was found near where the defendant was arrested; the other was found inside the victim’s trailer. The parties stipulated that the two shoes were a pair.

The evidence further included testimony that the gun collected at the crime scene was a “Jennings 9,” and that when the arresting officer conducted a pat-down search of the defendant, he found a yellow duffle bag in the defendant’s

left-hand pocket that contained a nine millimeter round for a handgun.

The evidence also included the victim's testimony that, although there was another person in the trailer, this person jumped out of the trailer before the fight began. The victim testified that he woke up, heard his girlfriend screaming outside, opened up the curtains in front of the sliding glass door, and "saw somebody jumping out of [the] sliding-glass door"; then, he got "[s]macked over the face."

The victim's girlfriend and two neighbors all testified that they did not see the person who was later identified as the defendant leave the trailer until after the fight began. The victim's girlfriend testified that, after she left the trailer, she heard the fight taking place inside the trailer and then, sometime later, saw someone in the doorway of the trailer. She testified that she heard this person fall and then felt him run right past her. Although she started to pursue the person, she stopped when she was told that her neighbor had apprehended him.

One of the victim's neighbors testified that he heard a gunshot and then saw "a pretty good-size fellow that had a short crew cut" jumping off the porch of the victim's trailer and running. The neighbor heard a thump when the person either hit a car or hit the ground. This person was later apprehended by another neighbor. The neighbor who apprehended the person testified that he too heard a gunshot and then saw a man "leap[ ] up from the front of a vehicle" and begin running. Based upon this testimony, viewed in the light most favorable to the State, we conclude that a reasonable juror could have found that the defendant was the person inside the trailer who was attacking the victim, and not the person who left the trailer before the fight began.

We next consider whether the evidence was sufficient to convict the defendant of the felon in possession charge. To convict the defendant for being a felon in possession, the State had to prove that he was a convicted felon and that he knowingly owned, had in his possession, or under his control the weapon described in the indictment. See RSA 159:3; see also State v. Hammell, 147 N.H. 313, 319 (2001). The defendant stipulated that he was a convicted felon. Thus, to convict, the State had to prove only that he knowingly owned, possessed or had under his control the weapon described in the indictment.

In his brief, the defendant concedes, as he must, that "substantial evidence establishes that the gun found at the scene was used during the assault." In light of this concession, because we have concluded that the evidence was sufficient for a rational juror to find that the defendant was the person who assaulted the victim, we also conclude that it was sufficient for a rational juror to find that the defendant was a felon in possession.

In sum, evaluating the evidence in the light most favorable to the State, we

conclude that a rational juror could have concluded beyond a reasonable doubt that the defendant was a guilty of being a felon in possession and of first-degree assault.

Affirmed.

NADEAU, DALIANIS and DUGGAN, JJ., concurred.

**Eileen Fox,  
Clerk**